UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MARK LENZI, Plaintiff,	:	Civil Action No.: 1:21-CV-1371
versus	:	
UNITED STATES DEPARTMENT OF STATE, et al. Defendants.	:	Thursday, April 14, 2022

The above-entitled motions hearing was heard before the Honorable Patricia T. Giles, United States District Judge. This proceeding commenced at 10:27 a.m.

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P R O C E E D I N G S

THE DEPUTY CLERK: Civil Action 21-1371, Mark Lenzi versus United States Department of State, et al.

Would counsel please note their appearances for the record. Would counsel note their appearances for the record.

MR. SUAREZ: Good morning, Your Honor. This is Christopher Suarez from Steptoe & Johnson on behalf of the plaintiff, Mr. Mark Lenzi.

MS. FISCH: Good morning, Your Honor. Kate Fisch of Steptoe & Johnson on behalf of plaintiff, Mark Lenzi.

MR. BARBA: Thomas Barba, Steptoe & Johnson, here for Mark Lenzi.

THE COURT: Good morning.

MR. BARBA: Good morning.

MR. MEZGER: Good morning, Your Honor. Matthew Mezger from the United States Attorney's Office on behalf of defendants. I'm joined today by Ms. Catherine Yang from the Federal Programs Branch. She'll be arguing before the Court today. And Ms. Laura Wetzler, civil chief of the U.S. Attorney's Office.

THE COURT: Good morning. Okay. I believe this is your motion.

MS. YANG: Thank you, Your Honor. Good morning.

THE COURT: Good morning.

MS. YANG: This is an action against the State Department alleging failure to accommodate, disability discrimination and retaliation under the Rehabilitation Act, as well as a separate claim of a First Amendment violation arising out of the federal employment.

As Your Honor is aware from the briefs, defendants have moved to dismiss the Rehab Act claims for failure to state a claim, and the First Amendment claim for lack of jurisdiction. Our position is laid out fully in the briefs, so, for today, I'll just highlight the top line reasons why we believe each claim should be dismissed.

So starting first with the Rehab Act failure to accommodate claim. We presented numerous reasons in our briefs why this claim should be dismissed; today I'll just focus on two.

The first is that plaintiff did not exhaust his administrative remedies for this claim. There's no indication in the administrative materials that he raised a failure to accommodate claim in those proceedings. And failure to accommodate is analytically and legally distinct from a claim of disparate treatment or disability or discrimination. They involve different elements, different actors, and so many courts across many circuits have held that you don't exhaust one by simply alleging the other.

Several cases from within the Fourth Circuit that

I think are particularly illustrative of that is the *Cox* case coming out of South Carolina and the *Rankin* case coming out of Maryland.

The second reason that the failure to accommodate claim should be dismissed is that plaintiff focuses on the idea of overseas assignments as an alleged accommodation, but critically, he doesn't allege that an overseas accommodation would be needed to accommodate any limitations associated with his disability.

The purpose of the Rehab Act is to accommodate mental or physical limitations that arise from someone's disability so that they can do their job. And so, for example, if someone has a disability that causes them severe headaches, and that can be accommodated by limiting their screen time, you know, that's the kind of thing -- the kind of causal connection between accommodation and a disability limitation that's required. And I think the *Hamill* case of Maryland explains this requirement very clearly.

So here, the limitations that plaintiff alleges from his disability are things like headaches, sleeplessness, light sensitivity. Those are all things that have nothing to do with overseas assignments. The fact -- the geographic location of an assignment isn't going to address whether someone suffers from headaches.

THE COURT: And when he was before the EEOC, he

did not identify the transfer or an overseas assignment as an accommodation?

MS. YANG: Exactly. That's the failure to exhaust issue that I discussed.

THE COURT: Right.

MS. YANG: So certainly we understand that plaintiff may prefer to work abroad, but really that -- the focus of the Rehab Act is asking what is an accommodation that is actually going to address limitations associated with a disability. And of course, as Your Honor noted, the failure to exhaust issue is also a straightforward threshold reason why this claim should be dismissed.

Moving on to --

THE COURT: And if we don't have that, we don't even look at the second part of it.

MS. YANG: Exactly. Exactly.

Moving on to the Rehab Act disability discrimination claim, as I understand it, plaintiff advances two theories under this claim, the first being failure to promote, and the second being the non-selection for four overseas assignments: Frankfurt, Belgrade, Warsaw and Athens.

So I'll start with the failure to promote. And this claim, again, is easily dismissed because, just like failure to accommodate, it wasn't exhausted. The

administrative materials, and even the allegations at paragraphs 86 and 90 of the complaint make it very clear that the scope of plaintiff's administrative complaint was focused on the non-selection.

And I think particularly it's important in this context within the foreign service to understand that promotions and assignments are two completely separate things by operation of statute. They have different decision-makers, different processes, different requirements, different criteria, timelines. And so that kind of factual divergence between promotions and assignments within the foreign service is exactly the kind of divergence between claims that the Fourth Circuit repeatedly has held in cases like *Dennis* and *Chacko* and *Evans*, does not put the employer on notice of a claim. So the failure to promote issue I think, again, is easily discriminated for that reason.

Turning to the non-selections, which, again, are regarding four overseas assignments, these claims I think fail for three primary reasons, and the reasons apply equally to each.

So the first is -- the first reason is that plaintiff relies principally on allegations that the department did not select him for each of these positions "because of his disability." And there are several times

throughout the complaint where that language arises. But Supreme Court and Fourth Circuit precedent is very clear that those types of allegations, without additional factual elaboration, are not given any credit, even on the motion to dismiss stage.

THE COURT: But when you look at this in the totality and you look at all these allegations and we're taking them in the light most favorable to the plaintiff, he's alleging that prior to this date, he was an exemplary employee. He was able to work abroad fully.

After his injury, he was returned stateside. He was put in this status that is supposed to be temporary, but, for him, has lasted three years. He's applied for these numerous assignments, and each time where he was either the only person there, or even when there was a second person there, this assignment is -- I don't know if it's readvertised or reconfigured, but it's moved to an entry-level position that he is no longer available for. And the only thing that has changed is his -- his disability.

And when we look at those facts and these allegations, and there's also a memo there where he is -- during the process where he is seeking -- and this may relate more to your retaliation -- the retaliation claim than the disparate treatment claim, but there's even a memo

that references his disability and the fact that he's been speaking out about it.

When we read these facts -- or when I read these facts in the light most favorable to the plaintiff, why isn't that enough to get beyond -- I'm not getting to the merits, but why isn't that enough to get beyond a motion to dismiss?

MS. YANG: Certainly. And I think I'll structure my response in three parts.

So the first part is to I think emphasize that a discrete act claim is necessarily moored to a specific adverse action. And so when we're looking to see whether a particular action -- a particular employment action was plausibly motivated by unlawful animus, we're looking at the facts surrounding that particular claim. You know, and this sort of makes sense logically, too, because you could have four employment actions over time, right, but each one maybe involved different decision-makers or different circumstances, you know, different factual -- a different factual circumstance.

And so, you know, while certainly you might consider the overall -- you know, the breadth of those allegations as part of background understanding, when you're looking and analyzing whether someone has stated a particular claim with respect to a specific action, you have

to look to see whether there are factual -- sufficient factual allegations with respect to that action to infer plausible unlawful animus with respect to that action. And for the reasons that we explained in the papers, we think that's missing here.

The second piece of my response, I think, is to try to shed a little light on the overcomplement status based on facts that are alleged in the complaint. And so taking a step back, as Your Honor knows, employment within the foreign service is assignment-based. And so, you know, employees are assigned to one assignment, they perform that assignment for the amount of time of the assignment, and then they move on to their next assignment.

Because of that, when employees are between regular assignments, the Department places them on overcomplement status. This occurs across the board, and so that could come up in a number of different ways.

So, for example, let's say that an employee has completed -- you know, has completed or is very close to completing their current assignment but haven't yet lined up their next assignment, they would be placed on overcomplement status for that interim time. Or you might have a situation where the employee is, for whatever reason, unable to complete their current assignment and move on to their next assignment. During that interim period, they

would be placed on overcomplement. So, you know -- and that is alleged in paragraph 79 of the complaint.

When people -- when employees are on overcomplement status, they're given meaningful work, they continue to receive performance evaluations, they continue to be considered for promotion if they're otherwise eligible. There's no impact on their pay, there is no impact on their grade. Again, really, it is a temporary designation when an employee is between assignments.

And because foreign service --

THE COURT: But he's been in it for three years.

MS. YANG: Certainly. And so -- and so because overcomplement is intended to be temporary just for when people are between regular assignments, when an employee continues to remain unassigned for a certain amount of time, the Department will then consider directing them to a specific assignment because the Department has every interest in making sure that its employees are in regular assignments.

And so that's actually what happened here. Plaintiff was placed in overcomplement after he was voluntary medevaced from his China assignment because he was no longer able to do that assignment and wasn't able to continue on to his next assignment, so he was placed on overcomplement.

During that time, and while he was receiving treatment in the United States, the Department gave him domestic duties to perform so that he was still, you know, doing work, earning his paycheck. And he alleges that he took no issue with those domestic duties, at least initially. And we see that at paragraphs 9 and 28 of the complaint.

Plaintiff didn't then start applying for overseas assignments until late 2019, late 2020. As we know, he didn't get them, so he remained in overcomplement. Again, overcomplement is what happens when you are in between regular assignments.

Then in March of 2021, the Department said that if he continued to be unassigned, they would consider directing him into an assignment consistent with what I mentioned earlier. That's at paragraph 77. And six months later when he still wasn't in an assignment, the Department did just that and directed him into a particular assignment. Again, because the Department has every interest in making sure that its employees are in regular assignments.

And so I certainly acknowledge that the length of time that plaintiff was in overcomplement was approximately three years or so, but, you know, that is an operation of what happens by policy when a foreign service employee is between regular assignments. And so, you know, the fact

that he wasn't able to find a regular assignment in the meantime is simply, you know -- that is why we're focusing on those particular assignment decisions in grounding our analysis of the disparate treatment, discrimination claim.

And so the third piece -- the final piece of my response to Your Honor's question is to return to those particular four assignment decisions and explain that, you know -- so A, there are a lot of allegations about how the Department did not select him for those because of his disability. We can disregard those because those are not factual allegations.

The second attempt is to invoke these similarly-situated comparators. But there's nothing in the complaint that actually provides any factual elaboration into who those purported people are, you know, anything to allow us to infer whether or not those people are actually plausibly similarly situated to allow for a meaningful comparison. And when you take away those allegations that are not to be credited, you are left with very few facts to actually support a plausible inference of discrimination.

So just to take an example, the Warsaw assignment. Plaintiff alleges only that that assignment was offered to another bidder. That appears at paragraph 74. The fact that the panel decided to go with someone else alone on its -- you know, with no elaboration, that allegation is not

sufficient to give rise to a plausible inference of discrimination.

And, similarly, you know, there are several positions where plaintiff alleges that they were converted to entry-level positions. Again, on its face, a conversion to entry level has nothing to do with disability, discrimination. And, in fact, you know, subscribing to plaintiff's theory would require us to, you know, adopt the view that the Department was willing to affect other employees who had applied to those positions, apart from plaintiff, by converting the whole thing to entry level. And, you know, as it's pled, the complaint doesn't provide the factual allegations to support that leap of logic.

And then -- so then turning to retaliation -- and I'll address Your Honor's question about the statement about media interviews. So I'll take that first.

So the statement that Your Honor mentioned is with respect to the Belgrade position. And the statement specifically was something to the effect of plaintiff regularly conducts media interviews that are reported around the world. Something to that effect.

THE COURT: In reference to -- according to the complaint, it also references his disability.

MS. YANG: Correct. Correct.

And so I think there are two -- two main issues

with focusing on that allegation as suggestive of unlawful animus.

The first is that that decision -- that statement was actually made after the Belgrade assignment had already been offered to someone else, and so the decision had been made.

THE COURT: Right. But it was during the period when he was requesting that they review.

MS. YANG: That's correct. Yes, that is true. But I think the point that I'm trying to convey is that the decision had already -- you know, the wheels of that employment decision had already begun spinning. You know, after the decision not to offer him that position was made, he then instituted this appeal during which we have this statement.

THE COURT: But if -- if that -- even if it's after the decision is made and there is a statement like that to the person who is supposed to reconsider it, could that not be -- could there not be some animus involved in even deciding not to reconsider it in making that decision? Because, remember, I'm not looking at the merits; I'm just looking at the allegation and read in the light most favorable to the plaintiff.

MS. YANG: Right. I don't think there is, at least to a plausible level, which is the level required for

pleading.

And the references that I go back to are the Fourth Circuit authorities in *Horne*, *Buchhagen* and *Francis*, among others in the briefs, that basically say when you have an employment action already in process and then protected activity occurs in the interim and then there's a final decision, the fact that protected activity was injected into the middle doesn't somehow transform the whole thing into a retaliatory act, because that action was already -- you know, had already been put into motion before the protected activity. And so, you know, some of those -- some of those cases arose in the context of what's known as a performance improvement plan in the Federal Government. And so, similarly, you know, that's a recommendation for an action to be taken.

THE COURT: And as I sit here, I don't recall whether or not those cases involved the dismissal stage or the summary judgment stage.

MS. YANG: I believe *Buchhagen* was a dismissal -- was affirming a motion to -- was affirming a dismissal of a complaint at the pleading stage. I believe *Francis* was summary judgment. And I can't remember off the top of my head what *Horne* was. But I'm pretty sure that *Buchhagen* was at the dismissal stage. And certainly there have been District Court decisions since, you know, that trio that

have applied it at the dismissal stage. I don't think that we cited those District Court decisions in our papers, but, you know, certainly we would be happy to provide them if that's useful. But there have certainly been District Court decisions applying those decisions -- applying the Fourth Circuit decisions at the dismissal stage.

And then finally, I think -- the final point that I would make with respect to this alleged statement is that statements by non-decision-makers are not considered direct evidence of any kind of unlawful animus. Here, the statement is attributed to plaintiff's career development officer who I understand wrote some kind of background memo.

You know, so even if we're taking ourselves out of the initial decision going to the appeal, it's not a statement that can be attributed to the appeal authority. And so I think for that additional reason, it's not terribly probative of the issues that are actually properly before the Court on a discrete act claim of either retaliation or discrimination.

With respect to the other retaliation pieces, I'll just briefly note I think two points. So, first, we're generally dealing with two categories of protected activity, the first being plaintiff's accommodation requests; and the second being his EEO activity.

With respect to the accommodation request, it's

undisputed that there was a multi-year lag between when he requested accommodations in 2018, when he later -- you know, several years later, did not get the assignments that he wanted. There's lots of case law that says that kind of passage of time cannot support a plausible inference of retaliation.

That's especially the case like, when here, the Department continually provided him with accommodations during that time. And so the Fourth Circuit explained in the *Hollestelle* case. Other circuits have explained, as cited in our papers, that when you have that kind of extensive accommodation, that willingness to accommodate an employee, you can't then turn around and say, actually, the Department -- the employer was motivated to retaliate against me for engaging -- for requesting that accommodation when they demonstrated that willingness to engage with the accommodation.

So that disposes, I think, of the -- of any retaliation claim arising out of the accommodation request, which then brings us to the EEO activity.

THE COURT: Are you about to address now the retaliation with respect to the EEO activity?

MS. YANG: Exactly.

THE COURT: Okay.

MS. YANG: Exactly. And so I think here there are

two main flaws in the allegations, at least as they've been pled.

The first is that there's no allegation that any decision-maker involved with any of the assignment decisions knew about his EEO activity. There's none in the complaint. And logically, you know, the Fourth Circuit has said that you can't accuse someone of taking action against you because of your protected activity if they didn't know about your protected activity. It's just a logical fallacy to say that you could otherwise.

The second piece is that, again, there are several months to years that pass between the EEO activity and when plaintiff didn't get an assignment that he wanted. The specific timelines are set out in our briefs, so I won't go through all that again. But, again, the Fourth Circuit has said that a delay of even two months is too long to -- can be too long to infer retaliatory motive. And that appears in the *Horne* decision, which was two months, and *Perry*, which was two to three months.

And I understand the plaintiff says there was other evidence of retaliatory animus during this intervening period, but as we've explained in the papers, he doesn't actually plead any events that can reasonably be viewed as being retaliatory.

THE COURT: But what about -- and I understand

respondent's position on the overcomplement status. So I think I'm going to do this in two parts.

First, one, why isn't maintaining him in the overcomplement status for that amount of time, why can't -- why isn't that an adverse action? Because in his complaint, he goes through and talks about what he's not receiving when he's in the overcomplement status. Because he's not overseas, he's not entitled to certain reimbursement that he receives or certain increases. So why isn't just the maintaining him in that overcomplement status, why can't that alone be an adverse action?

And if it is, then we do have continued action, even during the period where there's these EEO complaints. Because there were -- I believe there were complaints in June and July and August of 2020, and then there were denials coming in October. And I know what you're talking about, well there's -- you know, two-month delay is not enough. But when you also have the continued period in that overcomplement status, why isn't all of that read together?

MS. YANG: Certainly. So I'll take your first question first about adverse action.

The reason the overcomplement status is not considered an adverse action is because the Fourth Circuit has drawn a very clear line, a very clear definition of what constitutes an adverse action.

You know, I understand -- we've described in our papers how the Department has taken a somewhat contrary view with respect to transfers. But, respectfully, the binding precedent is what it is, and that says that adverse actions have to affect pay, have to affect, you know, your title or your position. Something really significant, really substantial.

THE COURT: And by pay, you mean actual salary as opposed to what he says that he's losing in pay --

MS. YANG: Correct.

THE COURT: -- because he does say he is losing money.

MS. YANG: Correct. I understand the allegation to be that there are additional sort of ancillary benefits associated with being in a foreign post, especially some that are in tougher locations. But the base salary is the same, and those sort of ancillary benefits -- you know, I sort of analogize to thinking like differences in locality pay for federal employees. You know, you're still within your same grade level, you're still within your same grade and step level, but you might be getting paid differently depending on, you know, whether you're in Portland, Oregon or the D.C. area. And so, you know, that's sort of in my mind where I go with that.

Overcomplement doesn't change the grade level or

anything. Again, like I mentioned before, you're still given meaningful work when you're in overcomplement. He describes some of that work in his complaint. You're still evaluated for your performance during that period. You're still being considered for promotion if you're otherwise eligible during that period. And, again, it's kind of a -- it's an interim step between regular assignments that every employee goes into.

THE COURT: Isn't adverse action, though, doesn't it also include any kind of condition that you impose on an employee that could cause a chilling effect and not want them to, you know, proceed with other -- or file other claims under the Rehab Act? Isn't that also part of the definition of what an adverse action can be?

MS. YANG: Within discrimination claims, no. The Fourth Circuit precedent is very clear that it has to be -- it has to fall within the definition of cases like *Holland* and others that we've cited.

In the retaliation context, you know, there's been some debate over the last couple of years following the Burlington Northern case, which I think is what Your Honor was referencing. Respectfully, that case arose in the private sector context, which is different from the -- which deals with a different section of Title 7. I understand that we're not talking about Title 7 here.

But Burlington Northern was interpreting a different provision of Title 7 that applies specifically to private sector employment. There's a completely separate section that deals with public federal employment under Title 7. And so, you know, our position is that the Burlington Northern standard, while it might -- while it does apply certainly to the private sector, there's been no published Fourth Circuit decision saying that it equally applies to federal sector employment.

THE COURT: Thank you.

MS. YANG: And then to -- so that's why the overcomplement is not, itself, an adverse action; it's just sort of a temporary place where you are when you're between regular assignments.

And then to answer Your Honor's second question about why this doesn't constitute, you know, continuing retaliatory animus, again, I mentioned that this is just -- this is a status that applies to anyone who's between regular assignments. So it's not discretionary as to, you know, if you're between regular assignments, we may or may not put you in overcomplement. But I think the bigger piece, especially for the retaliation claim, to consider is that plaintiff was placed on overcomplement status in October 2018. That is years before any of his protected activity, certainly before -- you know, certainly well

before his EEO activity in June through August of 2020. That is a very, very lengthy period of time.

And so, again, this brings me back to those Fourth Circuit authorities that say when something -- when an action has already occurred before protected activity and then later on protected activity happens and the same action continues throughout, you can't attribute retaliatory animus to that action, because it was already in place before the protected activity. And that's just the same case here with that overcomplement status.

I think finally, and just very briefly, I will address the First Amendment claim. And as Your Honor knows from the papers, our position is that the Court lacks jurisdiction over this claim because the Foreign Service Act precludes the kind of standalone Constitutional claim that plaintiff tries to bring here.

We describe the framework of the Foreign Service Act in our briefs and why that sets out this comprehensive scheme that precludes going beyond the statute for any rights or remedies. And actually, plaintiff in his opposition didn't contest any of that framework. So I think that's, you know, very important to note.

It appears that what plaintiff is really saying is that he spoke out about perceived disability discrimination, how it was affecting his employment. But that kind of claim

is precluded precisely because it has to be brought under the Rehabilitation Act. That's the whole reason why the Rehab Act exists. And many courts have held that the Rehab Act is the exclusive remedy for all claims arising out of federal employment with regard to disability discrimination. And of course he's brought that Rehab Act retaliation claim here, so he can't tack on an additional Constitutional layer to that same claim.

I wasn't quite clear from the opposition, but to the extent that he also tries to argue that this whole line of authority, including the Supreme Court decisions in *Fausto* and *Elgin* are irrelevant, because, unlike those, he's bringing dual discrimination and Constitutional claims --

THE COURT: But do we even get there? Because he's asked for monetary judgment in reference to the First Amendment claim.

MS. YANG: Right. Right. So he has asked for both. He's asked for monetary relief, as well as equitable relief.

THE COURT: But the equitable relief listed in the complaint does not appear to go to the First Amendment claim.

MS. YANG: I think that's an excellent point, Your Honor. And as we discussed in our opening brief, certainly any monetary claims against the Department and these federal

officials who are sued in their official capacities is off the table immediately, because there's undisputedly been no waiver of sovereign immunity for that kind of claim.

Your Honor correctly notes, I believe, that, you know, there may not be a specific request for equitable relief --

THE COURT: That specifically goes to the First Amendment claim.

MS. YANG: Right. That specifically goes to the First Amendment claim. So certainly that is an additional thing to consider.

You know, litigants are limited by their pleadings. They can't amend their complaint through briefing or argument. But, you know, I just wanted to take a step back, too, and say, you know, to the extent that plaintiff wanted to try to amend his complaint to add on a request for equitable relief specific to his First Amendment claim, you know, that is also off the table for all the reasons we've discussed in the briefs. You know, there's no avenue for him to do that. Anything that's tied to his Rehab Act claim has to be brought under the Rehab Act. Any attempt to distinguish himself from the *Elgin* and the *Fausto* line of cases is unsuccessful because that kind of mixed discrimination and non-discrimination case that he describes isn't available to -- isn't available to a foreign service

employee by operation of the CSRA and the FSA.

And so that sort of brings us directly into the holding of *Fausto*, which is that when Congress decides to exclude a certain category of people from an otherwise comprehensive scheme, that exclusion has to be given meaning, it's deliberate, and that person can't then go around the statute and try to bring other claims some other way.

So for all these reasons, we would ask for a dismissal of the complaint, and, you know, we welcome any questions that Your Honor may have.

THE COURT: Thank you.

MR. SUAREZ: Good morning, Your Honor. May it please the Court. Again, this is Christopher Suarez from Steptoe on behalf of plaintiff.

I think it's important to start in this case by taking a bit of a step back and making two points before I get to the individual counts.

The first is the standard of review. As Your Honor noted, we're on a motion to dismiss, and it's about whether we've pleaded a plausible claim as to each element, which is an even lower bar than the prima facie case as the Government concedes.

The second point is, it's important in this case to really take a step back and look at the entire context,

as I think you agreed to. It's that our client was stationed in China, he was afflicted with this Havana syndrome, a very extreme illness and a severe situation. He was then, against his will, placed indefinitely for three years, and it continues to this day, in something that's akin to a domestic desk duty.

Now, he was in diplomatic security. A good analogy for this is thinking about when someone gets in trouble in the police force and they say you're on desk duty. That's essentially what has happened here with our client, Mr. Lenzi, over the last three years.

And so with that in mind, I'm going to go through the three counts. And I'm going to start actually with the disparate treatment count, because I think that contextualizes the case and allows Your Honor, I think, to have the proper framework to analyze the counts and whether they should proceed.

So for disparate treatment, the law says he has to show he's disabled, he's otherwise qualified for employment, and he nonetheless suffered an adverse employment action. The first two about disability and being qualified for employment, there's no dispute. We've repeatedly put counts in the complaint showing that he's well qualified, he's received great performance reviews over many years.

The only element that really is in dispute is the

third element of whether there's an adverse action. In this case, there have been at least two such adverse actions. Your Honor pointed to the first one, which is this indefinite reassignment. He's been placed in this employment purgatory for three years and ongoing, domestic desk duty, and that's despite his ongoing request to be moved overseas throughout the time.

It is black-letter law from the Burlington case that reassignment with significantly different responsibilities -- directly from the Supreme Court -- or a decision causing significant change in benefits is an adverse action. They never disputed that in their brief. They seem to make new arguments today, but that was never disputed.

And if you look at Section 2302 of the statute, personnel action is a detailed transfer reassignment, a decision concerning pay benefits or awards, or any other significant change in duties or responsibilities. Right.

And so there's two reasons why the indefinite reassignment to domestic desk duty is an adverse action. First, it caused a significant change in compensation and benefits; and second, it significantly altered Mr. Lenzi's day-to-day job responsibilities.

THE COURT: But the respondents' argue that it's -- you know, it's just not any compensation, it has to

be specifically salary.

MR. MEZGER: Yeah. And Your Honor, they did not cite any case that stands for that specific proposition that it's this specific salary, and the statutory language and the Supreme Court language says benefits.

And the key here, Your Honor, is counsel mentioned changes in like regional pay and things like that, you know, if you have the same job in the United States. You've got to remember, we've got to -- again, looking at the context, he's a foreign service officer who is, you know, stationed abroad, and with that comes a lot of extra benefits. Those include pay for your kids' school, those include housing benefits, those include hazard pay.

Now, maybe you can take the hazard pay, you know, and put that in the different, you know, regions. Maybe. I don't think so. But, you know, there are multiple layers of benefits that Mr. Lenzi loses as a result of being shuttled, and as counsel mentioned, it's called directed into an assignment. Has been repeatedly directed into this assignment.

And so that benefits piece alone shows there's an adverse action. But we don't even have to go there, Your Honor, because there's an independent basis, which is the significant change in responsibilities. We've pleaded in the complaint that he had language skills that were suitable

for these positions abroad, that he, you know, is someone who really loves and enjoys this kind of overseas work. And those come with certain responsibilities and duties.

And we've pleaded throughout the complaint that his duties were diminished, and he was placed in a state where, in our view of the case, they're trying to kind of force him to want to quit because it makes his life not as exciting and interesting as it would be if he were to be in the standard responsibilities. And that's why the law accounts for the diminishing of responsibilities and duties and those sorts of things.

And we have multiple, you know, cites to the record on that, you know, complaint. So on the compensation, it's complaint paragraph 12, Note 4. The benefits, complaints paragraphs 15 and 16. And in the demotion of duties, it's complaint paragraph 8, complaint paragraph 9, complaint paragraph 12.

So on this count, Your Honor, that, alone, is sufficient for us to survive a motion to dismiss. And there was no argument from counsel about exhaustion as to that issue. So that, alone, gets us over the line.

Now, I will briefly address failure to promote, which they also don't dispute. We've pleaded facts -- or at least on the merits, I didn't hear much of a dispute. We've pleaded facts that shows he was told he was going to be

promoted to FP-2. And FP-2 is better than FP-3. It's somewhat counterintuitive. And he was told he's going to be at FP-2, and here's an assignment where you're going to be FP-2. Then he gets injured, he gets this radiation, you know, or whatever causes the Havana syndrome, and then he's moved and he never gets FP-2, despite being told in his review he's going to get FP-2. And that's sort of -- you're right on the cusp of it Mr. Lenzi, no, we're not going to give it to you.

And to Your Honor's point about the temporal aspect, for three years he's hasn't been promoted. And we also pleaded details about how -- or at least mentioned in our brief that typically these promotions occur within one or two years. So that's circumstantial evidence that makes our point. And they've also given him these stretch assignments that are at an FP-2 level, but they're still paying him and keeping him at FP-3 for purposes of his pay and all of those sorts of things. So all of those things are very significant.

Now, with regard to the exhaustion point, I want, again, to take a step back. Because throughout the Government's arguments, they've never mentioned the standard for exhaustion. Right. There's a standard for that. And one point I want to make sure is clear for the record, too, is he filled out these complaints which, you know, are very

detailed, they're 150 pages. You know, he did his best. But he did draft these on his own. I have that on authority from my client. He did check a box that he had some family friend lawyer that maybe he knew or something. But no lawyer helped create these EEO complaints. So I think that's an important context for Your Honor to have.

But, apart from that, we noted multiple cases from the Fourth Circuit and from this Court, the Eastern District of Virginia, that show that the standard is what is reasonably expected to follow from the charge based on all of the allegations that are pleaded.

There's also case law we cited in our brief that says magic words are not required that they didn't respond to. Because I think what the Government wants is a standard where you have to say "failure to promote" or, you know, "failure to accommodate," exact words.

THE COURT: Well, the case law says that you do have to identify what type of discrimination you're talking about, and that is one that is referred to specifically when it's a failure to promote, and that's the allegation.

And I don't think that you need a lawyer to help you come up with that claim because, you know, what he did prepare is extensive and goes through, you know, the allegations of what he said has happened to him. But in those, he does not -- he never says they did not promote me;

he says that he was not assigned to an overseas --

MR. SUAREZ: Yeah. Thank you for that, Your Honor. I will say, even if we get there, he actually did say he wasn't promoted. He actually talked about this issue.

THE COURT: Well, if he did, you didn't cite that in your pleadings. Because what I read that you -- that you did cite talks about -- it was a passing reference to what a supervisor said that he should be promoted at some time. And that, at some point, they stopped mentioning those things, that something disappeared. But that's not saying the same thing as they failed to promote me.

MR. SUAREZ: So, Your Honor, I appreciate your comment. With your indulgence, I would say we cited a couple places. So one was, I think you referenced DEX 1 at 78 which is where he does reference the supervisor saying he's going to be promoted. And so I agree with you that one, taken alone, probably is not enough.

I think what does get us over the line, again under this standard, is if we look at DEX 1 at 80 that we did cite in our brief. And that specific one did reference the fact that things began to -- began to get worse, and he -- they made no mentions of promotions and they stopped doing that after he was afflicted with the disability. So --

THE COURT: But that's not saying the same thing as they failed to promote me, they stopped mentioning it in my reviews. Because even if something is mentioned in a review doesn't mean it's going to happen; it's a suggestion. And even if the review, it appeared as a -- you know, like this should happen.

MR. SUAREZ: Yeah. I think -- I think respectfully that, you know, I guess we might have a slightly different view of interpretation of that.

But, you know, regardless, on this particular count, the disparate treatment count, we don't even need to go to the exhaustion because of the fact of the indefinite employment purgatory. So the failure to promote is a separate issue. It doesn't matter for today's purposes in terms of whether there's a permissible motion to dismiss. You know, we do submit that there's enough to get across the line, but we obviously respect Your Honor's position on that.

So let me turn to the failure to accommodate issue. And, again, focusing on the legal elements of that claim. To establish a failure to accommodate, Mr. Lenzi must show he was an individual with a disability; two, the employer had notice of the disability; and three, with reasonable accommodation, he could perform the essential functions of the position and the employer refused to make

the accommodation.

What happened -- so here, again, the Government doesn't dispute that Mr. Lenzi had a disability. Havana syndrome has not come out of the Government's mouth a single time, and that is the key here.

Number 2, the employer had notice of the disability, and that was undisputed. There's no dispute on that.

Number 3, with reasonable accommodation to perform the essential functions, we've pleaded extensively about his ability to perform the functions. And for most of these positions he requested reassignment, he's got a Class 2 medical clearance, which means that the office assessed whether he's qualified and assessed whether he could be permitted to work there with accommodation, and they determined that he could.

THE COURT: Let me focus you on this claim and what I have the issue with.

In your complaint, you talk about how Mr. Lenzi requested certain accommodations, and how those were given to him. I believe he requested them, and he says that he received those, and he was -- based on receiving those, he was able to perform those duties.

My issue is that you are trying to call the overseas assignment the accommodation, and that was never

requested as an accommodation. I don't even know if that particular assignment could be requested as an accommodation based on the meaning of accommodation. But even in what you cite, I think it's at DE-1 page 6, "Consulate Frankfurt was recommended to me by a State Department DRAD specialist as the best overseas mission set up to handle DRAD accommodations like mine."

So, again, it's evident, based on how he's speaking about it, it's that these accommodations that he received, which were -- let me see. I don't know where he listed out all of the accommodations. But they included, like, telework and something with the computer to help with the light sensitivity and all of those things. And so those are the accommodations. The overseas assignment is what he prefers and wants based on his skill set, but that, in and of itself, is not the accommodation.

MR. SUAREZ: I appreciate Your Honor's points. And I will -- I'll concede at the threshold before I give this response. This case doesn't fit into the typical framework for a reassignment accommodation, and I think giving you some context and stepping back will help the response as you evaluate this.

The first point is, reassignments are an accommodation in the statute. You probably are aware of that, but just for the record, 42 USC 12111(9)(B).

Reassignments are an accommodation.

THE COURT: They can be.

MR. SUAREZ: Yes, absolutely.

THE COURT: Yes, they can be. Because he was reassigned from his -- the position over in China --

MR. SUAREZ: Yeah.

THE COURT: -- back to the United States.

MR. SUAREZ: The fundamental key here is, and admittedly, this case would be -- it's a unique fact pattern. That's just candid for the record, it's a unique fact pattern. But what we explain in our brief and what is compelling here and why this claim should most certainly proceed is because of the points Your Honor made before.

The *Wirtes* case that they initially cited and we responded to, and then we didn't hear much of a reply, right, it stands for the proposition that in the typical case, the Government's trying to do reassignments because -- and they're trying to put someone in a position they might not like very much. And it's usually the plaintiffs fighting against the reassignment, and that's why it's usually an accommodation of last resort and why the case law in the Fourth Circuit says "unusual circumstances call for reassignment as an accommodation."

Well, this is sort of the reverse situation. It's a very odd situation. Because of what Your Honor pointed

out, that he has been in this directed assignment for three years, against his will, involuntary, that's exactly what the *Wirtes* case and the *Lowe's* case we cited specifically counsel against. The Fourth Circuit wants to make sure people are not put in situations like Mark Lenzi. And those cases, precedential Fourth Circuit opinions, stand very strongly for that proposition. Again, no rebuttal on that in reply from the Government.

And so it's in this context where, you know, if you do not permit this claim to proceed, Your Honor, what you're essentially allowing the Government to do is say, well, we're going to just put him in a directed assignment against his will. We're going to pick and choose some accommodations. We'll give him some glasses, we'll give him a typewriter, we'll give him a few things, but we're not going to allow him to have the fundamental thing he always had. And as you alluded to in referencing our DEX exhibits, the PEX and DEX, he talked to his DRAD officer about these accommodations. That's in the complaint.

THE COURT: But not about the overseas assignment as an accommodation.

MR. SUAREZ: Well, Your Honor, I would submit on that that --

THE COURT: And even in your brief at one point you said he could have performed the duties of the Belgrade

job with accommodation. With accommodation. Not that that was the accommodation. He could do that job with accommodation. And that is said repeatedly through your -- the EEO complaint.

MR. SUAREZ: Yeah. So I would go back. You know, so on that, I -- I would submit that that is not a correct legal proposition. If you look at the four elements of a failure to accommodate claim, it's one, individual with a disability; two, employer had notice of disability; three, reasonable accommodation, he could perform the essential functions; and four, the employer refused to make such accommodation. He is asking for an accommodation so that he can perform the duties that he always performed for a decade. That is what he's asking to do.

THE COURT: But that's not what he says here. He says I can do my job. That's what the argument is here.

MR. SUAREZ: Yeah.

THE COURT: The argument is -- here is, I shouldn't have been removed from my overseas locations. Or even if I was removed at the time, I should be able to do my overseas assignments because I can do them if you give me the same accommodations that you have given me here. That's what his argument is. But the overseas -- this is not --

MR. SUAREZ: I think --

THE COURT: I understand -- I understand your

position on this.

MR. SUAREZ: Yeah. It's in -- my point is -- and this is why I argued the disparate treatment first, because I think these arguments are intertwined.

So we're at a motion to dismiss stage, and the question is whether it was a plausible claim. So our view is that the case should be permitted to proceed. If you look at -- and I think -- I think Your Honor does acknowledge he discussed, you know, these reassignments with DRAD, with MED, it was all intertwined. And so the notion that we would place form over function, so to speak, and say he didn't say specifically I request that as a reasonable accommodation, we submit that that would be contradictory to the, you know, Fourth Circuit law about reasonably following from the charge and all of that.

And so, again, given the posture, given the --

THE COURT: I understand your position.

MR. SUAREZ: Okay. Thank you, Your Honor.

So I'd say then -- I'll move on to retaliation, because I think Your Honor understands that the four positions we talked about were all denied on the merits in terms of their -- in terms of their requested assignment, and they were denied. So we don't have to go into detail about that.

So on retaliation, I think Your Honor, again, hit

the nail on the head here in terms of where the rubber hits the road. There was a lot -- you know, there's sort of two issues. And I think we can survive the motion -- there's no exhaustion on this count, first of all.

But second of all, if we go straight to the Belgrade position that you were alluding to, that one alone gets us across the line if we just look at the facts of that and we walk through them.

On October 19th, 2020, there was a New York Times article that quoted our client providing statements regarding how the State Department handles his disability. That's in paragraph 122, we cited it in Footnote 1 of our opening brief. He was complaining, at least in part, about disability discrimination.

Two weeks later, the Belgrade job was offered to someone else on November 4th, 2020. And that's at paragraph 65. Then he was in an assignment challenge called The Shootout in the State Department, and he submitted documentation showing that he's medically qualified for this position on November 10th, 2020. That's in paragraph 66. But then within four hours of submitting that saying, hey, I can do this position, I talked to the embassy, he was demoted from Class 1 medical clearance to Class 5. This was the only time that that happened. He ultimately got Class 2, but really quickly they demoted him to that

Class 5. So that was just long enough he didn't get the position. And then that timing alone, that suspicious timing of two weeks was enough. We cited the *Jones* case, we cited the *Ali* cases.

And then if that were not enough, Your Honor alluded to something else, which is important, which is paragraph 69 of the complaint where we pleaded that Andrew Kaleczyc, who was his career development officer. This is the guy who was supposed to be helping his career, but our allegations are that he was actually affirmatively trying to hurt our client's career. He sent an action memo that -- I'm reading from the paragraph right now that advised Director General -- sorry, Director General Perez -- he drafted an action memo to Director General Perez advising her to deny Lenzi's request. His memo cited Mr. Lenzi's disability and states that he regularly conducts media interviews which are widely reported around the world, referring to Mr. Lenzi's public comments about his disability and the ANC's retaliatory acts against him.

So that, you know, apart from the suspicious timing, confirms that we have a plausible claim of retaliation. It's circumstantial evidence that there was a -- a nefarious motive on the part of the agency based on his advocacy public statements, you know, about the -- about the disability discrimination. And so, for those reasons

alone, we feel that the retaliation claim should not be dismissed.

Your Honor also noted some points about the continuing pattern of discrimination over many years, which we agree with. You know, there are multiple -- you know, there are multiple attempts to file EEO complaints and the seriatim denial of every position, you know, might be coincidental after one, but after four or five, you start to see a pattern. You know, so we feel that there is a continuing pattern of retaliation based on that, and those kind of claims can be cognizable as well. But, again, Belgrade alone gets us there.

And then we also discussed the specifics of the Warsaw position, January 28, 2021, medical clearance. Then he filed the EEO complaint February 5th, 2021, and the Warsaw position was denied just six days later. The case law says when you have that kind of timing, that in and of itself is enough. So that's another independent basis for surviving on that.

So does Your Honor have any further questions on retaliation?

THE COURT: I do not.

MR. SUAREZ: Okay. So then I'll just go to the final count, the First Amendment issue.

So I think just a couple things at the threshold,

and I might as well just get straight to the point on a couple issues you raised. Number 1 is, you know, we understand Your Honor's point regarding in the count itself, it referenced monetary damages. You know, we would submit that the prayer for relief covers --

THE COURT: I'm even looking at the prayer for relief, and I'm saying the relief that you have requested there does not appear to go to your First Amendment argument.

MR. SUAREZ: I see. Okay. I appreciate the clarification.

I think some of it does, and obviously there's the catch-all, any other relief the Court deems just improper, that's in there as well. And so, you know, our view is that, you know, that would encompass, you know, injunctions and issues relating to retaliation pertaining to public statements, not retaliating if he goes on 60 -- he's been on 60 Minutes, he's been in the New York Times, all these sorts of things. So we do believe that this does encompass, you know, it's -- it also talks about ordering defendant to permit employees to reference their disability and --

THE COURT: But in the -- but when they're doing their comments for employee evaluation reports, that --

MR. SUAREZ: Yeah. So there's another one that says "enjoin defendant from classifying employees with

overcomplement." That could -- you know, there could be retaliation to classifying employees as an overcomplement as a result of --

THE COURT: I'm speaking to your First Amendment claim.

MR. SUAREZ: Yeah. Yeah. No. And I guess my point is is that I think those -- because I take -- your point is well taken about -- that some of them may not seem to go to it. But I think ones like enjoining the overcomplement goes to both. Because you can see a situation where other employees advocate on the 60 Minutes, advocate on New York Times and these things. And there may be situations where they don't necessarily talk about the disability discrimination. Perhaps they talk about, you know, issues relating to directed radiation, perhaps they talk about other issues.

THE COURT: But this is -- this has nothing to do with media statements; this is specifically referencing what employees can say in their employee evaluation reports. And it gives a list, and then behind it is a list of items that they should be free to list in their employee evaluation reports.

MR. SUAREZ: Yeah. No. And I --

THE COURT: Because I think what --

MR. SUAREZ: I understand that, which is why --

THE COURT: Because I think what you're doing -- we can't do amendment through, you know, these types of pleadings --

MR. SUAREZ: No. No. No.

THE COURT: -- and arguments in court; it has to be here.

MR. SUAREZ: I understand. And actually what I was saying is I went off of that particular one. What I was focusing on was J, just to give you an example. Because J talks about enjoining defendant from continuing to classify as overcomplement. And that could have a nexus to First Amendment activity; not just to necessarily the disability-related activity.

THE COURT: I understand your position.

MR. SUAREZ: So -- okay. So but I appreciate Your Honor's indulgence in that.

And because, you know, we have obviously requested any dismissal to be without prejudice, I'll just briefly touch on whether there can be jurisdiction to this claim, to the extent Your Honor has a view on the prayer for relief.

Our view is that with respect to equitable or declaratory relief, there is no sovereign immunity. We've cited numerous cases from numerous circuits that confirm that.

And then with regard to the -- the sort of notion

of the Foreign Service Act preempting, we explain that in our response brief that under the CSRA, this case is properly here as a mixed case. And under the FSA, if you look at the statutory scheme, cases like this would also go to District Court under like 22 USC, I believe it's 2140 or 2139, some of those provisions. And so as a result -- sorry 4139. 4139 and 4140 22 USC permit Foreign Service Act claims to go. And in their opening brief, they treated the CSRA and FSA as kind of being analogous and similar, and then they kind of backed off that and went to FSA only for the final thing.

And then we note, too, that there are cases like *Garcetti v. Ceballos* from the Supreme Court, 547 US 410, that public employees do not surrender their First Amendment rights.

And then I think it's important to talk about *Elgin* for a moment because *Elgin*, which they relied on heavily, it specifically says on page 10, "the CSRA does not foreclose all judicial review of petitioner's Constitutional claims, but merely directs that the judicial review shall occur in the Federal circuit." So that case was largely about what the right forum should be, and that was an MSPB and, you know, other situations.

So, again, because they don't dispute that we're properly in District Court, assuming Your Honor agrees with

us that there is a right to equitable and declaratory relief where sovereign immunity has been waived, we do submit that there's a cognizable claim here. And so -- you know, and there's plenty of evidence of a retaliation. There's no 12(b)(6) argument on this count.

And so we would submit that to the extent Your Honor is inclined to dismiss that count, we would seek permission to amend, per Your Honor's guidance to the extent that you believe that we can establish jurisdiction with a more properly pleaded complaint.

So unless -- and -- oh, I guess one last argument they made was they made an exhaustion argument on that as well. There are plenty of citations that show that he talked about First Amendment retaliation in his EEO complaint.

So, for example, he talked about it DEX-2 at 169, DEX-2 at 8, PEX-2 at 26 to 29, DEX-2 at 5, DEX-1 at 15, DEX-1 at 16. And all of these reference him talking to the New York Times. One actually says "the Bureau of Diplomatic Security has retaliated against me for the negative press it has received from media outlets such as 60 Minutes and the New York Times." And that's the one at DEX-2 at 169. So we believe we've exhausted that as well.

THE COURT: Was that just a general reference, though, to media coverage or indicating the coverage that he

participated in?

MR. SUAREZ: It's referencing the stuff he participated in. Actually, one of the cites we provided is one of the New York Times articles itself in the administrative complaint. So he put some of that in the record that he submitted. So we think that's significant.

And the very last point I'll say before I sit down, Your Honor, is that we understand that -- you know, the position that some of these claims obviously do relate to disability, some of these public statements, specifically disability. But there is more of a general issue of public concern with regard to the Havana syndrome that Mr. Lenzi's been talking about. And so there's not a one-to-one correspondence between all of the public advocacy and the disability discrimination. It's part of it, but it's not all of it. And so that's why we submit that there shouldn't be preemption with regard to the First Amendment claim. We feel it's part and parcel of the overall purpose of facts that needs to proceed in this case.

So unless Your Honor has any other questions, I thank you for your time, and I submit the case. Thank you.

THE COURT: Thank you.

MS. YANG: Thank you, Your Honor. I have just a few brief high-level points to make.

So the first overarching point I think is to

underscore that, you know, on a motion to dismiss at the pleading stage, each claim that a plaintiff identifies in his complaint has to be plausibly pled. If it's not, it has to be dismissed. And so how the Court comes out on, you know, failure to accommodate or disability discrimination or retaliation or the First Amendment claim is absolutely critical to understanding what claims are allowed to proceed past the pleading stage.

And similarly with respect to the subparts of each of those individual claims, so whether, you know, under disability discrimination we're talking about failure to promote or non-selection, how the Court comes out on each of those -- on whether each of those aspects is properly pled is absolutely critical to understand at the dismissal stage.

And, again, even breaking it out even further, whether the Court believes that specific adverse actions have been pled, whether it's the Belgrade position or the Warsaw position or the Athens position, so on and so forth, each of those, again, has to be plausibly pled. So that's my first overall point.

The second is that, you know, at their core, discrete act disability and retaliatory claims are discrete act claims, they are disparate treatment claims. There's no such thing as a continuing violation of a disparate treatment claim. The Supreme Court in the *Morgan* case made

that abundantly clear. And so the notion that they have -- that there's this indefinite reassignment as an adverse action, that's not a thing, that's not a claim under the disparate treatment discrete act framework the plaintiff has brought his claims under.

The next thing I would mention is that I heard some argument on the failure to promote about going to the exhaustion point. Your Honor, the standard is in our briefs. Exhaustion is what's in the charge and what a reasonable investigation would uncover from the things in the charge. I don't think there's any reasonable dispute that failure to promote is nowhere in the charge asserted as a claim. It certainly did not continue to the end of the administrative proceedings where plaintiff alleges the very scope of what his claims actually were. We see that they don't include failure to promote. But even the other part can -- you know, what a reasonable investigation can uncover.

As I mentioned at the outset, within the foreign service, promotion and assignment are completely separate. They have totally different decision-makers, totally different processes. So I don't think there's really, you know, a good-faith way to say that investigation into assignment decisions could reasonably expect to lead to investigation to promotion decisions.

On the failure to accommodate piece, I think Your Honor understands our position on that, you know, so I won't belabor the point. Clearly he didn't request overseas assignment as an accommodation. He couldn't have either because the law is unequivocal that an accommodation under the Rehabilitation Act has to address limitations associated with a disability.

Overseas assignment doesn't address -- isn't alleged to address any of the limitations associated with the plaintiff's disability. I didn't hear any response on that piece -- on that critical piece in the reply just now.

Also, you know, we responded to plaintiff's citation to *Wirtes* and the reassignment point at page 5 of our reply just so Your Honor has that citation ready.

On retaliation, the plaintiff's argument focused, again, on the same things that he identified in his opposition brief. We fully addressed each of those points in our reply brief, so I'll refer the Court to that portion of our reply brief on that.

And finally, on the preclusion point, we absolutely dispute the First Amendment claim is properly before the District Court in this action, just to be clear. The Foreign Service Act sets out a very clear path to District Court review, one that plaintiff does not allege he's followed, one in which he undisputedly has not

followed. And his attempt to say that he repeatedly referenced First Amendment activity in his EEO complaint is misplaced. Because as I mentioned at the outset, a mixed case complaint is not available by statute to a foreign service employee. That exclusion is in the statute at 5 USC 7511(B)(6). It expressly says this section does not apply to foreign service employees. And so the claim is precluded.

For all those reasons, we would request that the claims be dismissed, and that the failure to accommodate claim be dismissed with prejudice because no amendment can cure the deficiencies, that the First Amendment claim be dismissed without prejudice for lack of jurisdiction for the reasons stated today and in our briefs. Thank you very much.

MR. SUAREZ: May I make one short point? Okay. We'll be one minute.

So the fundamental point, going back to the failure to accommodate, the ostensible basis the Government had for putting him in the domestic desk duty in the first place was because of his disability. That is why he was removed from these positions.

And so as Your Honor evaluates this, ask yourself, is it appropriate for someone to do that and then disallow him from proceeding a claim to be made return to that

position when the basis for him being removed was because, allegedly, he didn't perform the essential functions. Now he's saying he can, reassign me there, and they're denying it. That is a textbook claim, and that's all intertwined with what he put in his complaint and everything under the standard. So we would submit that's a notion that it's disconnected from his disability. That's a fiction that the Government created itself.

And then, finally, I would just say with regard to the First Amendment again, the case is properly here in the District Court. They don't dispute that. And there's no case that says the Foreign Service Act precludes a constitutional claim to move forward. So we submit that the claim can proceed and there can be jurisdiction or is jurisdiction.

Thank you, Your Honor.

THE COURT: Thank you.

This matter is before the court on the defendants' motion to dismiss. And at this stage, I'm just looking at whether or not the plaintiff in the complaint set forth a claim of relief that is plausible on its face. And I'm to draw all inferences in the light that's most favorable to the plaintiff.

And here what I'm -- in Count 1, the failure to accommodate. The threshold issue here is whether or not

this claim was exhausted. I understand plaintiff's position, but I find that it was not. Because in the EEO complaint, plaintiff never raised or alleged that the overseas assignment was an accommodation request. It was presented as I stated, that he could do the assignment there with his accommodations. And so as a matter of law, I'm granting the motion as to Count 1, and that claim is dismissed.

As to Count 2, the retaliation. And here the plaintiff alleges retaliation based on a number of things. His complaints to supervisors about assignments to his foreign post, or not having assignments to those foreign posts, disclosure of medical conditions, requested and received accommodations, and the filing of the EEO complaints. Those are all bases that you allege in the complaint as indicative of retaliation.

And here -- we didn't have specific argument on it here today, but there was in the briefs, and the disclosure of medical conditions in general are not protected activity.

In regards to plaintiff's general complaints to supervisors about not giving or receiving overseas assignments, general complaints to supervisors aren't protected activity either. And as the complaint reads, it alleges that he complained about the failure to get overseas assignments after years of exemplary service. And that

reads nothing more than like a general complaint to a supervisor. And so you haven't, at this stage, alleged any more. So the motion to dismiss is going to be granted as to that argument, but I'm going to give you leave to amend. Because perhaps there are other statements that he made to supervisors that would be actionable or would be considered protected activity.

But as opposed to the requested and received accommodations and the filing of those EEO complaints, the defendants are alleging that those claims fail because there's no causal connection between the request for accommodations or protected activity. And that also there are no factual allegations that could -- from which we can possibly infer denial of assignments were the result of a retaliatory animus. And I disagree for all the reasons that I was talking about earlier.

I do think that there are sufficient facts and inferences here in the light most favorable to the plaintiff that there was retaliation in this case, and I'm not getting into the merits, but there were multiple things that were alleged here. The overcomplement status being in there for the three years. The fact that he was denied his overseas request in 2020 and 2021. The time period between those EEO complaints, the June, July and August complaints, and then those that -- the later decisions in October and November.

I do -- I'm not going to go through all the facts here, but I do think when I read the complaint in the light most favorable to the plaintiff and draw all reasonable inferences, that there is a retaliation claim here that should go forward. And so I'm going to -- the motion in that respect is granted in part and denied in part. It's granted as to -- as I said, to the complaints about the supervisors, as well as the general disclosures of medical conditions, but it's denied in other respects.

Then in terms of Count 3, the disparate treatment. There, the allegations are the claim from plaintiff's prospect it's about the failure to promote, that he was treated different than employees who were not disabled, the fact that he was refused for overseas assignments and his designation and continued designation in the overcomplement status.

The failure to promote was not exhaustive. I understand plaintiff's position on that, but it was not something that was identified in the EEO complaint. But as to the balance, I do think for all of the reasons that, you know, I've referenced earlier in some of my questions that the facts here are sufficient for the claim to go forward on disparate treatment here. And so, again, the motion is granted in certain parts and denied in certain respects.

But as to Count 4, you have pled for monetary

damages in reference to your First Amendment arguments, and you talk about, well, I do ask for other relief. But I'm not going to imagine what other relief could be here and relate it to -- and what's related to the First Amendment. Because right now on these pleadings, it is not here. And so the motion to dismiss is granted as to Count 4 as well.

All exceptions preserved, and I'll issue an order.

MR. MEZGER: Thank you, Your Honor.

THE COURT: I thank counsel for your briefs and your advocacy here today. Thank you. We're adjourned.

(Proceedings adjourned at 11:44 a.m.)

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

Stephanie Austin

Stephanie M. Austin, RPR, CRR